110

(5)

No. 08-367

Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ISLANDER EAST PIPELINE COMPANY, L.L.C.,
Petitioner,

v.

GINA MCCARTHY, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,

and

STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF THE PETITIONER ISLANDER EAST PIPELINE COMPANY, L.L.C.

ANTHONY M. FITZGERALD
CARMODY & TORRANCE, LLP

THOMAS L. STANTON
Associate General Counsel
Spectra Energy Islander East Pipeline Company, L.L.C. as Operator for Islander East Pipeline Company, L.L.C.

FREDERICK M. LOWTHER
Counsel of Record
WOODY N. PETERSON
BETH L. WEBB
JANET M. ROBINS
JOAN M. DARBY
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-2200

Counsel for Petitioner

November 3, 2008

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Islander East Pipeline Company, L.L.C. (Islander East) submitted a Rule 29.6 corporate disclosure statement in its Petition for a Writ of Certiorari filed on September 18, 2008.

TABLE OF CONTENTS

	Page
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
I. RESPONDENTS IGNORE THE QUESTIONS THE PETITION RAISES AND ANSWER QUESTIONS IT DOES NOT PRESENT	1
II. ISLANDER EAST RAISED THE ISSUES BELOW	4
III. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S ATTENTION	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994)	6, 7
United States v. Marathon Development Corp., 867 F.2d 96 (1st Cir. 1989)	7
ADMINISTRATIVE DECISIONS	
Islander East Pipeline Co., 100 FERC ¶ 61,276 (2002)	3
Islander East Pipeline Co., 102 FERC ¶ 61,054 (2003)	3
STATUTES	
15 U.S.C. § 717, *et seq.*	2
15 U.S.C. § 717r(d)	2
33 U.S.C. § 1341(a)	2, 3
RULES	
Sup. Ct. R. 10(c)	6

IN THE

Supreme Court of the United States

No. 08-367

ISLANDER EAST PIPELINE COMPANY, L.L.C.,
Petitioner,

v.

GINA MCCARTHY, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,

and

STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF THE PETITIONER ISLANDER EAST PIPELINE COMPANY, L.L.C.

I. RESPONDENTS IGNORE THE QUESTIONS THE PETITION RAISES AND ANSWER QUESTIONS IT DOES NOT PRESENT.

The fundamental question the Petition asks the Court to answer at the merits stage is: where did Congress draw the jurisdictional line between the Federal Energy Regulatory Commission's (FERC) comprehensive power to regulate the route and

construction of interstate pipelines under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.*, and a state agency's power to block such construction under § 401(a) of the Clean Water Act (CWA), 33 U.S.C. § 1341(a) (478a-479a).[1] *See* Petition at i, 3. Granting the Petition would allow the Court to decide whether, under § 19(d) of the NGA, 15 U.S.C. § 717r(d) (462a), it is "inconsistent with the Federal law governing such permit" for a state agency to use its § 401(a) power to deny a water quality certification to an interstate pipeline for reasons that are inconsistent with:

- the text and purpose of the CWA, the Environmental Protection Agency's (EPA) regulations and guidelines, Connecticut's Water Quality Standards and Connecticut Department of Environmental Protection (CTDEP) precedent in § 401(a) cases;
- the regulatory scheme established under the NGA, which gives FERC exclusive jurisdiction to regulate a pipeline's route and construction methods; and
- specific expert determinations made by FERC in authorizing the pipeline, after extensive environmental review.

See Petition at 18-20. CTDEP's Opposition never addresses these points, or explains why CTDEP should be permitted to deny a § 401(a) certification based on impacts to the seafloor that have nothing to do with water quality. It fails also to explain why these issues are not worthy of this Court's attention

---

[1] References to pages in the Appendix refer to the Appendix attached to the Petition.

and without further delay, given their importance to American energy security, to energy consumers nationwide and, as emphasized by the natural gas industry *Amici*, to the United States.[2]

CTDEP instead posits arguments for Islander East that it does not make, and proceeds to attack them.[3] Islander East does not contend that FERC's exclusive jurisdiction over interstate pipelines under the NGA prevents a state agency from denying a CWA permit for a pipeline FERC has approved. *See* Opposition at 1, 5-6, 9. As Islander East acknowledges in the first paragraph of its Petition, of course an interstate pipeline must obtain both a certificate of public convenience and necessity from FERC and a certification under § 401(a) of the CWA, 33 U.S.C. § 1341(a) (478a-479a), from each affected state, Petition at i, and of course a state agency has the power, when properly exercised, to use its § 401(a) authority to veto an interstate pipeline. The Petition poses entirely different questions: what is the "Federal law" governing a state agency's decision to issue a § 401(a) permit to an interstate pipeline, and when does a state agency act "inconsistent[ly] with" that law?

---

[2] Brief *Amici Curiae* of the Interstate Natural Gas Association, *et al.*, Docket No. 08-367 (*Amici* Brief).

[3] CTDEP also mischaracterizes FERC's findings about alternatives. While FERC staff identified a hypothetical alternative, FERC found that the environmental advantage of that alternative (an in-water route several miles shorter than Islander East's) was outweighed by Islander East's significant non-environmental advantages – having a second pipeline to Long Island to increase reliability and supply security as well as to introduce pipeline-to-pipeline competition. *See Islander East Pipeline Co.*, 102 FERC ¶ 61,054 (2003) (262a); *Islander East Pipeline Co.*, 100 FERC ¶ 61,276 (2002) (380a).

II. ISLANDER EAST RAISED THE ISSUES BELOW.

Contrary to CTDEP's contention,[4] Islander East raised the questions presented in its Petition – whether it is inconsistent with Federal law for an agency to use its § 401(a) process to "regulate issues that fall within FERC's exclusive regulatory authority under the NGA" and "to refuse to defer to findings made by FERC in its final Orders," Petition at i – in the Second Circuit. There are many examples, but only a few are needed to prove the point. Islander East argued in the Second Circuit that:

1. "a state's [§ 401(a)] power is not unfettered,"[5] but must be exercised in a reasonable fashion and consistent with the language and purposes of the CWA, EPA's regulations and guidelines, CTDEP's precedent, and the regulatory scheme established by the NGA and the determinations made by FERC;[6]

---

[4] *See* Opposition at 3 (Petitioner failed to raise claim that "FERC approval under the National [sic] Gas Act . . . restricts or limits state review under the Clean Water Act"). CTDEP also points out that Islander East did not raise below any claim that "because FERC has 'exclusive jurisdiction' over interstate gas pipelines, a state agency cannot deny a permit for a pipeline that FERC has approved." *Id.* at 5-6; *see id.* at 9. The latter is true but irrelevant – Islander East does not advance such a claim in its Petition either.

[5] Brief for Islander East, Docket No. 06-5764-AG, at 8 (Jan. 19, 2007) (Jan. 2007 Brief).

[6] *See id.* at 7-13, 35-36; Reply Brief for Islander East, Docket No. 06-5764-AG, at 2-7 (Feb. 20, 2007) (Feb. 2007 Brief); Brief for Islander East, Docket No. 05-4139-AG, at 14-15 (Sept. 30, 2005) (Sept. 2005 Brief).

2. "to allow §401 to become a[] basis for state control over siting would run counter to the NGA, which places exclusive control over siting of interstate pipelines in FERC's hands";[7]

3. "[t]he concept that CTDEP has boundless discretion to deny [water quality certifications] based simply on its water classifications also flies in the face of the statutes that comprise the scheme of comprehensive federal regulation of interstate natural gas pipelines";[8]

4. "the legislative history of EPACT [the Domenici-Barton Energy Policy Act of 2005] makes clear that Congress expected it would be necessary to construct interstate pipelines in water bodies like Long Island Sound, and it would not be consistent with the purposes of the CWA or NGA, as amended by EPACT, for a state to interpret or implement its WQS and anti-degradation policy in so narrow a manner as to preclude such construction";[9]

5. CTDEP was not free to ignore the FERC decision authorizing the Islander East pipeline,[10] but must defer to certain of FERC's findings:

---

[7] Jan. 2007 Brief at 8 n.16.

[8] *See* Feb. 2007 Brief at 5.

[9] Jan. 2007 Brief at 10 (footnote omitted).

[10] *See* Jan. 2007 Brief at 11 ("The 2006 Denial, like those before it, improperly ignores the determinations made by other state and federal agencies . . . ."); *id.* at 13 ("'[W]here comments from responsible experts or sister agencies . . . cause concern that the agency may not have fully evaluated the project . . . these comments may not simply be ignored.'") (alterations in original) (citation omitted); Feb. 2007 Brief at 15 ("CTDEP acted

> Essential findings in the Denial are plainly inconsistent with the expert findings of FERC, which are part of the record evidence before the CTDEP. While the CTDEP's responsibilities under the CWA are distinct from those of FERC and the CTDEP has authority to reach conclusions different from FERC, it is not a reasonable exercise of that authority for the CTDEP to ignore FERC's findings (and the supporting record) . . . .;[11]

and

6. "[a]t a minimum, FERC's actions are entitled to substantial deference."[12]

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S ATTENTION.

The questions presented by Islander East about the proper scope of state agency authority under the CWA are "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court."[13] Sup. Ct. R. 10(c). As Islander East stressed

---

arbitrarily and capriciously in the 2006 Denial by completely failing to consider the conflicting studies, findings, and analyses of FERC, the [Connecticut Siting Council], the Secretary [of Commerce] and Task Force and by failing to explain why key aspects of the 2006 Denial run counter to the detailed determinations of those agencies.").

[11] *See* Sept. 2005 Brief at 42-43.

[12] Reply Brief for Islander East, Docket No. 05-4139-AG, at 19 n.18 (Nov. 14, 2005).

[13] CTDEP's notion that this Court answered the questions presented in Islander East's Petition in *PUD No. 1 of Jefferson*

in its Petition, "[a]llowing state agencies to redetermine issues within FERC's exclusive jurisdiction and finally decided by FERC would be contrary to the will of Congress because it would not 'help get [natural gas pipeline] projects . . . constructed,' but instead would prevent them from being built at all." Petition at 25-26 (alterations in original) (citation omitted).

Natural gas industry *Amici*, which collectively "represent all major sectors of the domestic natural gas industry," *Amici* Brief at 2, explain why the Court should not postpone consideration of these questions in Part III of their Brief ("The Decision Below Threatens Investment in New Pipelines That Are Needed to Meet the Nation's Demand for Natural Gas."). As those *Amici* explain, the impact of the decision below is not limited to the proposed Islander East pipeline between Connecticut and Long Island, but may also:

> discourage investment in the construction of critically needed gas transmission facilities whenever those facilities involve construction in the waters of more than one state. Nor is the effect limited to coastal water construction projects; virtually every interstate pipeline crosses

---

County v. Washington Department of Ecology, 511 U.S. 700 (1994), is erroneous. *See* Opposition at 9. As explained in the Petition at 4, the questions here are akin to one that the Court left unanswered in *PUD No. 1*. CTDEP also cites *United States v. Marathon Development Corp.*, 867 F.2d 96, 99 (1st Cir. 1989), for the proposition that Congress intended to give states veto power over the grant of federal permits "affecting a state's water quality." *See* Opposition at 7-8. That is true, of course, but irrelevant to the questions presented here, which concern the scope and nature of that veto power.

navigable water subject to State CWA § 401 certification.

Id. at 19-20. Accordingly, absent this Court's intervention, the Second Circuit's approach "threatens virtually every pipeline construction project" in the United States. *Id.* at 20.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANTHONY M. FITZGERALD
CARMODY & TORRANCE, LLP

THOMAS L. STANTON
Associate General Counsel
Spectra Energy Islander East
Pipeline Company, L.L.C.
as Operator for Islander
East Pipeline Company,
L.L.C.

November 3, 2008

FREDERICK M. LOWTHER
Counsel of Record
WOODY N. PETERSON
BETH L. WEBB
JANET M. ROBINS
JOAN M. DARBY
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-2200

Counsel for Petitioner